

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

NEBRASKALAND, INC.

and

Case No. 2-CA-39996

**LOCAL 342, UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION**

**ACTING GENERAL COUNSEL'S BRIEF IN REPLY TO
RESPONDENT'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S
EXCEPTIONS AND SUPPORTING BRIEF TO THE BOARD**

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**Dated at New York, New York
this 8th day of February, 2012**

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I. STATEMENT OF THE CASE

The Statement of the Case is as set forth in Acting General Counsel's Exceptions and Supporting Brief to the Board filed December 28, 2011 (the Exceptions Brief or AGCEB). Thereafter, Respondent filed an Answering Brief dated January 24, 2012 and due, pursuant to the December 30, 2011 letter to the parties from the Associate Executive Secretary, on January 25, 2012 (the Answering Brief or RAB). Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Acting General Counsel hereby files this Brief in Reply to Respondent's Answering Brief.

II. THE FACTS

The facts are as set forth in the Exceptions Brief (AGCEB 2 – 4).

III. ARGUMENT

POINT I The Board has not found that legislative history links union security with checkoff and the legislative history does not do so.

Respondent states that because the 1947 amendments addressed Sections 8(a)(3) and 302(c)(4), the Board in U.S. Gypsum, 94 NLRB 112 (1951), amended on non-relev. grounds 97 NLRB 889 (1951), enf. granted in part, den. in non-relev. part 206 F. 2d 410 (5th Cir. 1953), cert. den. 347 U.S. 912 (1954), found that the two sections were linked and, therefore, that checkoff was a mandatory subject of bargaining (RAB 6 - 7). Although checkoff is a mandatory subject of bargaining, nowhere in U.S. Gypsum, including footnote 7 on which Respondent relies,¹ does the Board make that link.² If all subjects addressed by the 1947 amendments were linked, payments to trust funds under 302(c)(5) would be linked to union security because such payments, too, are addressed in the 1947 amendments.

¹ Footnote 7 states that the legislative history of the 1947 amendments shows that Congress intended that the bargaining obligation contained in 8(a)(5) apply to checkoff.

² Respondent admits that the Act itself does not make that link (RAB at 11).

In Communications Workers of America v. Beck, 487 U.S. 735 (1988), the Court stated that Congress's decision to allow union security agreements reflected its concern that the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them through union dues and fees, Beck at 749 – 750. This statement, however, explains why Congress allowed union security pursuant to Section 8(a)(3), not, as Respondent contends, why they allowed checkoff pursuant to Section 302(c)(4) which section is not mentioned by the Beck Court.

Not even Respondent makes the argument that checkoff is a form of union security.³ Thus, Representative Hartley clearly misspoke when he stated as much (RAB 7). Union security requires membership in a labor organization at a certain point in an employee's employment. Dues checkoff does not compel such membership and, therefore, cannot be a form of union security. Further, Representative Hartley's statement occurs in the context of his discussing checkoff as an exception to payments by an employer to a union that would evidence employer domination pursuant to 8(a)(2). Section 8(a)(3) is not mentioned. Legislative History of the Labor Management Relations Act 1947, Volume I (National Labor Relations Board 1948) H.R. 245, 80th Cong., 1st Sess. at p. 29 (1947).

In sum, the legislative history referred to by Respondent (RAB 7–8) cannot be the basis for the Board's decision in Bethlehem Steel Company, 136 NLRB 1500 (1962) which did not even mention the legislative history to which Respondent refers.

POINT II The Board may overrule Bethlehem Steel if it was wrongly decided.

Respondent appears to contend that Bethlehem Steel was rightly decided because many subsequent cases have followed its holding. This contention is not true. Although a Board rule

³ Basic Patterns in Union Contracts, 14th ed. (Bureau of National Affairs 1995) at 97 sets forth the forms of union security - union shop, modified union shop, agency shop, and maintenance of membership.

may become well established through repetition, it may come to stand for a legal rule only through reasoned decision making. Local Joint Executive Board of Las Vegas v. NLRB (LJEB I), 309 F.3d 578, 582 (9th Cir. 2002).⁴ *Stare decisis* must give way in the labor law context if existing law is contrary to statutory principles, disruptive to industrial stability, or confusing. Levitz Furniture Co., 333 NLRB 717, 726 (2001). The fundamental policies of the Act are to protect employees' right to choose or reject collective bargaining representatives, to encourage collective bargaining, and to promote stability in bargaining relationships. *Id.* at 723.

Allowing checkoff to expire at contract termination discourages collective bargaining by enabling an employer to make a unilateral change; a circumvention of the duty to negotiate,⁵ NLRB v. Katz, 369 U.S. 736, 743, 747 (1962), unless that change is compelled by the Act (AGCEB 6–8, 12–16). Further, although, as Respondent admits, an employer, pursuant to an unrescinded authorization, may continue checkoff after contract termination (RAB 16), Respondent advocates for a rule where, after contract expiration, an employer may revoke at will an employee's choice to have checkoff continue.

With regard to Circuit Court cases that have followed Bethlehem Steel, (RAB 8 – 9), “(i)t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise.” Iowa Beef Packers, Inc., 144 NLRB 615, 616 (1963), enf. granted in part, den. in non-relev. Part 331 F.2d 176 (8th Cir. 1964). Conversely, the Board is also entitled to overrule a prior holding if it makes a reasoned decision to do so, McClatchy Newspapers v. NLRB, 131 F.3d 1026, 1035

⁴ A history of the Hacienda/LJEB series of cases is set forth in AGC 9 – 11.

⁵ Unilateral changes erode a Union's ability to bargain for the employees it represents upsetting the stability of the bargaining relationship. The Little Rock Downtowner, Inc., 168 NLRB 107, 108 (1967), enf'd. 414 F.2d 1084 (8th Cir. 1969)

(D.C. Cir. 1997), cert.den. 524 U.S. 937 (1998), unless, of course, the Supreme Court has ruled otherwise. The Supreme Court has not done so.

Respondent's contention that the Supreme Court followed Bethlehem Steel in Litton v. NLRB, 501 U.S. 190, 199 (1991) (RAB 8) is inaccurate. The Litton Court stated that it was "the Board's view that union security and dues check-off provisions are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement." This was not a holding. As stated in McClatchy at 1030, while the Supreme Court may recognize a Board doctrine, that does not mean that it has reached a holding on that doctrine.

With regard to Litton, Respondent wrongly contends that the Board has almost unlimited discretion to craft exceptions to the prohibition on unilateral changes (RAB at 10–11).⁶ Litton, however, appears to limit discretion to situations where there is a statutory imperative or the contractual surrender of a statutory right, and Respondent has not proposed any additional exceptions outside these limited circumstances.

Finally, that cases after Bethlehem have delinked checkoff from union security (AGCEB 11, 13) as well as linked them confirms that the current law regarding checkoff expiration is confusing. It is, in part, to remedy this confusion that Acting General Counsel (AGC) seeks to have the Board make a reasoned decision to overturn Bethlehem Steel. Respondent's pointing out that Bethlehem does not consider Section 302(c)(4) of the Act (RAB 15) is relevant only in that it shows that the Bethlehem Board's decision has led to confusion by not addressing a

⁶ Fall River Dyeing & Finishing Corp., 482 U.S. 27 (1987), cited by the Litton court for this proposition, concerned, *inter alia*, successorship which, unlike checkoff, which is addressed by Section 302(c)(4) of the Act, is not addressed by statute. Thus, a determination on successorship is made through a review of the facts, Fall River, at 42, rather than by statutory interpretation. Similarly the continuing demand rule in a successorship situation is not based on a statutory imperative but, rather, on the fact that it "makes sense." Fall River at 52.

section of the Act that shows checkoff doesn't terminate with contract expiration (see AGCEB 14 – 16).

POINT III Checkoff does not implement union security.

A union security clause requires that an employee be a member⁷ of his or her collective bargaining representative on a particular date. In order to be a member, an employee must pay the required dues and fees. Thus, it is the *payment* of the dues and fees that implements⁸ union security. Checkoff, an administrative convenience for both the employee and the union, is merely one of several methods by which payment is made.⁹ Were checkoff to be the actual implementation of union security, it would be required in a contract containing union security, an argument that neither Respondent, the Board, nor the Courts have made. The Court's statement in NLRB v. Penn Cork & Closures, 376 F.2d 52, 55 (2d Cir. 1967), cert.den. 389 U.S. 843 (1967), that employees sign checkoff authorizations under the influence of 8(a)(3) allowing union security simply confirms that checkoff is a convenience to employees working under a union security agreement, Atlanta Printing, 523 F.2d 783, 786 (5th Cir. 1975), not, as Respondent's asserts, that checkoff is directly related to union security (RAB 8)

Respondent denies that union security and checkoff are separate entities by first citing to the statement in Basic Patterns in Union Contracts at 11 (1995)¹⁰ that “(u)nion security provisions, including check-off and hiring arrangements are found in all of the agreements” in the book's database. This cannot mean that checkoff implements union security any more than it means that hiring arrangements implement union security, an assertion that no rational person

⁷ AGC will not discuss core membership and similar issues because they are not relevant here.

⁸ Implement means to accomplish or fulfill. Webster's Third New International Dictionary (1976).

⁹ Respondent concedes that the cessation of checkoff does not terminate an employee's duty to pay dues (RAB 21). Thus, an employee who revokes his checkoff authorization would still have to pay dues.

¹⁰ Oddly, while citing to this book, Respondent contends that it should not be considered (RAB 12).

would make. Further, Respondent admits that in a right-to-work state, checkoff cannot implement union security as union security is illegal in such states (RAB 13).

Respondent contends that Shen-Mar Food Products, Inc., 221 NLRB 1329 (1976), enf'd. in relev. part 557 F.2d 396 (4th Cir. 1977), and Atlanta Printing Specialties at 786, cited by AGC are inapposite (RAB 13) because they arose in right-to-work states. This fact does not change the findings that checkoff and union security are separate entities.¹¹ In any case, American Nurses Association, 250 NLRB 1324, fn1 (1980), which holds that "union security and dues checkoff are distinct and separate matters" arose in Missouri, a non-right-to-work state.¹²

POINT IV If the Board finds that checkoff survives contract expiration, the remedy should be retroactive.

The criteria for whether a remedy should be retroactive is set forth in SNE Enterprises, 344 NLRB 673 (2005)

A. Detrimental reliance

Respondent contends that it relied to its detriment on the Bethlehem line of cases. Respondent, however, was on notice in Hacienda Hotel, Inc. Gaming Corp. (Hacienda III), 355 NLRB No. 154 (2010), rev. granted and dec. vac. by Local Joint Executive Board of Las Vegas v. NLRB (LJEB III), 657 F3d 865 (9th Cir. 2011), the last Board utterance on the matter, that the exception of checkoff to the unilateral change rule as set forth in Bethlehem was at issue. While the Court, on review, distinguished between right-to-work and non-right-to-work states, the Board has not made that distinction.

¹¹ Thus, a contract with both a union security clause and a checkoff clause does not obligate an employee to sign a checkoff authorization. International Union of Electrical, Radio and Machine Workers, Local 601 (Westinghouse Electric Corporation), 180 NLRB 1062 (1970).

¹² That the issue in American Nurses was not identical to that in the instant case cannot gainsay the clear statement of the Board with regard to the non-relationship between union security and dues checkoff.

B. Effect on the purposes of the Act

Respondent incorrectly asserts that Wal-Mart, 351 NLRB 130 (2007), is relevant in this regard. Wal-Mart concerned the discharge of an employee who was not represented by a union asserting his “Weingarten” rights pursuant Epilepsy Foundation, 331 NLRB 676 (2000), dec. rev. in part by 268 F.3d 1095 (D.C. Cir. 2001), cert. den. 536 U.S. 904 (2002). While the case was pending before the Board, the Board overruled Epilepsy in IBM Corp., 341 NLRB 1288 (2004). In deciding not to retroactively apply IBM, the Wal-Mart Board found that the change of the rule in Epilepsy had a marginal effect on the purposes of the Act because it was a policy decision and the Act permitted both legal rules. That reasoning does not apply to the instant case which does not involve policy but, rather, interpretation of the Act, particularly Section 302(c)(4), the only section addressing checkoff. (AGCEB 14).

C. Injustice arising from retroactive application

The Board’s usual practice is to apply all new policies and standards to all pending cases in whatever stage. Levitz at 729, fn 66. The Board in Epilepsy found its new rule should be applied retroactively as generally changes in existing law or policy are given retroactive effect absent manifest injustice. The Court, in refusing retroactive application,¹³ centered its decision, as does Respondent (RAB 22 – 23, 25), on a detrimental reliance argument. Detrimental reliance, as shown in Point IV(A)(1), *supra*, is not a valid argument in the instant case.¹⁴

Retroactive application of a new rule in the instant case would not be punitive.¹⁵ Respondent alone was responsible for ceasing checkoff.¹⁶ Nothing compelled Respondent to

¹³ Note that in Wal-Mart, the Board was concerned with distinguishing the Board’s decision in Epilepsy concerning retroactivity. The Wal-Mart Board did not rely on the Epilepsy Court’s decision.

¹⁴ Unilateral changes in mandatory subjects of bargaining violate Section 8(a)(1) and (5) whether or not they are unlawfully motivated. MEMC Electronic Materials, Inc., 342 NLRB 1172, 1195 (2004).

¹⁵ AGC does not dispute that the Board’s remedies are to be remedial rather than punitive.

cease checking off dues as it admits (see p. 3, *supra*). Thus it is Respondent to whom the remedy should be applied rather than innocent employees who made a tender of dues when they signed checkoff authorizations. Ferro Stamping and Manufacturing Co., 93 NLRB 1459 (1951). The Board recognized this when, in West Coast Cintas Corporation, 291 NLRB 152, 156, fn 6 (1988) and Texaco, Inc., 264 NLRB 1132 (1982), enf'd 722 F.2d 1226 (5th Cir. 1984), reh'g. den. 729 F.2d 779 (1984), they found that the responsibility for making the union whole rested solely with the employer, the party that had illegally ceased checkoff.¹⁷ Further, employees might blame the union for the effective pay cut, thus undermining the Union's representational status by showing it to be ineffectual and, thus, exacerbating the harmful effects of the violation. NLRB v. Hardesty, 308 F. 3d 859 (8th Cir. 2002) (unilateral action will often send the message to employees that their union is ineffectual, impotent, and unable to effectively represent them).

Respondent's examples of remedies found to have been punitive bear no relationship to the situation at issue. Consolidated Edison Co., 305 U.S. 197 (1938), involved an elemental issue of due process, not in question here (invalidation a contract when one of the parties to the contract had not been a party to the underlying proceeding and the validity of the contracts was not alleged in the complaint). In Unbelievable, Inc., 318 NLRB 857 (1995), enf. granted in part, den. in part 118 F.3d 795 (D.C. Cir. 1197), the Board found that reimbursement of negotiation and litigation expenses effectuated the policies of the Act. It was the Court, whose ruling is not

¹⁶ Respondent's contention that the Board, in Bebley Enterprises, Inc., 356 NLRB No. 64, pp 2- 3 (2010), ordered a remedy that included retroactively deducting dues is not accurate. The affirmative portion of the Order simply requires that the employer honor the collective bargaining agreement including the dues checkoff provision, thus clarifying the somewhat ambiguous portion of the decision since dues could not have been deducted prior to the date of the Order. Further, the issue of retroactive deductions was not litigated. Had the Board intended retroactive deductions, they would have clearly stated so and given a reason for their holding.

¹⁷ Ogle Protection Service, Inc., 183 NLRB 682, 682 - 683 (1970), enf'd 444 F.2d 502 (6th Cir. 1971), cited by Respondent, concerns a different situation because dues that Respondent had failed to withhold were to be deducted from back wages and benefits owed employees. Thus, there was no impact on Ogle's employees' future wages.

controlling here, that found that reimbursement of litigation costs to be punitive. In Morrison-Knudsen Company, Inc., 275 F.2d 914 (2d Cir. 1960), cert. den. 366 U.S. 909 (1961), the Court found that the Board went beyond effectuating the Act when it ordered the employer to reimburse employees for dues and fees paid to the union when the primary beneficiary of the employer's unlawful conduct was the union. Such a situation is the opposite of that in the instant case wherein Respondent, not the Union, benefited from Respondent's illegal conduct. Contrary to the cases cited by Respondent, all AGC asks is a simple status quo ante remedy.

With regard to Respondents contention that some employees may have paid dues directly to the Union during the intervening time (RAB 26), that could easily be remedied by having Respondent reimburse the employee, rather than the Union, for those dues.

Finally, with regard to Respondent's "concern" that employees might have revoked their checkoff authorizations during the period between Respondent's stopping checkoff and any Order the Board might issue (RAB 22) that is a supposition that can never be ascertained. It is well established that the wrongdoer shall bear the risk of uncertainty that its own wrong has created. Texaco, Inc. at 1146.

POINT V Respondent should reinstate checkoff.

Respondent does not dispute that it is well-established that the Board requires an employer to reimburse the union for dues checkoff payments that it failed to make under a collective bargaining agreement where employees have individually signed valid authorizations, Plymouth Court, 341 NLRB 363 (2004). Rather, Respondent argues that reinstating checkoff would impair its freedom of contract. H.K. Porter Co., 397 U.S. 99 (1970), cited by Respondent, is inapposite as it prohibits the imposition of a provision of a contract to which the parties have

not agreed. This is not the same as ordering the time-honored remedy that AGC is requesting. If checkoff survives contract expiration, it must be reinstated.

POINT VI The Board has authority to act.

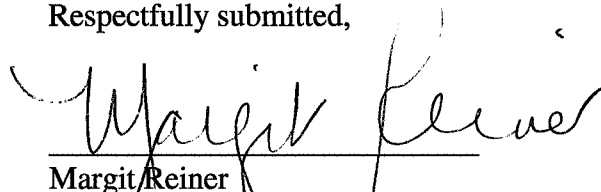
In similar circumstances, the Board has found that it is not appropriate for it to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." Lutheran Home at Moorestown, 334 NLRB 340, 341 (2001) citing U.S. v. Chemical Foundation, 272 U.S. 1, 14-15 (1926). See also Anderson v. P.W Madsen Inv. Co., 72 F.2d 768, 771 (10th Cir. 1934) ("There is a presumption of authority for official action rather than want of authority . . .").

IV. CONCLUSIONS

It is submitted that, on the basis of the entire record, a preponderance of the credible evidence supports the Acting General Counsel's position set forth in its Exceptions Brief and asks that the Board make the findings and issue the Remedy and Order requested therein.

Dated this 8th day of February, 2012
at New York, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Margit Reiner", is written over a horizontal line.

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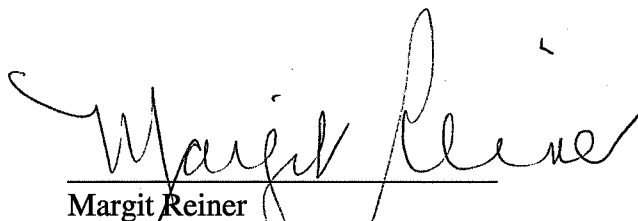
CERTIFICATION OF SERVICE

Copies of the Acting General Counsel's Brief in Reply, which has been e-filed with the Board, have been sent, by e-mail, this day, February 8, 2012 to:

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